IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 1047

UNITED STATES OF AMERICA,

Respondent,

—against—

AMERICAN RADIATOR & STANDARD SANITARY CORPORATION, JOSEPH J. DECKER and DANIEL J. QUINN,

Petitioners,

and

KOHLER CO., BORG-WARNER CORPORATION and NORMAN R. HELD,

Respondents.

PETITIONERS' REPLY BRIEF

The Government's brief in opposition uniformly fails to confront the substance of the questions presented by Petitioners. Repeated references to the length of the trial, the purported strength of the *prima facie* case, or the anti-trust character of the case do not negate the unresolved decisional conflicts which exist with respect to every issue raised by Petitioners.

The theme of the Government's brief is that the questions presented in this Petition were "correctly rejected" by the Court below under the standards of appellate review "appropriate" in "this type of case."[1] No amount of "antitrust" rhetoric can obscure the fact that this is a *criminal conspiracy case* in which three individuals have been sentenced to the same jail as any other convicted criminal defendant. Higher, not lesser, standards of appellate review are appropriate in reviewing such multi-defendant conspiracy trials.[2]

Antitrust conspiracy trials magnify the dangers inherent in conspiracy prosecutions. Since, contrary to the general rule, proof of an overt act is not essential, guilt or innocence is primarily dependent upon the meaning and intent underlying the words employed by the alleged conspirators and the jury's assessment of the character and credibility of the "conspirators'" testimony. The right to confront each declarant, to corroborate or impeach his testimony and to have the jury dispassionately evaluate such testimony becomes even more essential to the fairness of a "typical antitrust criminal conspiracy case." (G.B. at 12.)

The impairment of each of those rights in this case cannot be eradicated by an assertion that the Government's *prima facie* case was "overwhelming." (*See* Pet. No. 1047, pp. 4-8, 23-26) For example, the case as to Petitioner Decker was far from overwhelming: the Court of Appeals[3] merely found "sufficient" evidence to go to the jury on one of the "four phases." (G.B. at 4n. 3) All Petitioners, more-

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1. BRIEF FOR THE UNITED STATES IN OPPOSITION (hereinafter "G.B."), p. 12-14.

2. *E.g.*, *Dennis* v. *United States*, 384 U.S. 855, 860 (1966); *Krulewitch* v. *United States*, 336 U.S. 440 (1949); *Blumenthal* v. *United States*, 332 U.S. 539, 559-60 (1947); *Kotteakos* v. *United States*, 328 U.S. 750, 777 (1946).

3. The opinion of the court below, which was not officially reported when the petition was filed, is now reported at 433 F.2d 174.

ever, offered evidence which rebutted every material element of the Government's case and which, if believed, compelled acquittal. (Pet. No. 1047, p. 8)

I. Petitioners Were Denied the Right to Confront Pivotal Witnesses Against Them.

In response to Petitioners' challenge to the multi-faceted denial of their right to confrontation, the Government merely reiterates arguments unsuccessfully made in opposition to the petitions for writs of certiorari in *Bostic* v. *United States*, certiorari granted, No. 5250, O.T. 1970, January 11, 1971 and *O'Neil* v. *Nelson*, 422 F. 2d. 319 (9th Cir. 1970), certiorari granted, No. 336, O.T. 1970, November 9, 1970.

As in *Bostic*, Petitioners challenge the constitutionality of the prosecution's right to rely upon the co-conspirators exception to the hearsay rule to introduce highly incriminating extra-judicial declarations of available, but non-testifying, co-conspirator declarants. As in *O'Neil*, Petitioners question whether the right to confrontation is preserved where the alleged declarant, on cross-examination, denies making, or denies present recollection of whether he made, the out-of-court statement attributed to him.[4] Unlike *Bostic* and *O'Neil*, however, this Petition also raises for review the question whether incriminating out-of-court declarations of non-testifying co-conspirators are immunized from the requirements of the Confrontation Clause merely because they technically may be characterized as non-hear-

4. The Government's attempt to distinguish *O'Neil* from this case is a distinction without substance. (G.B. at 16-17) Incriminating declarations allegedly scribbled on hotel stationery (HCA notes), or purportedly made privately over the telephone or in a hotel room (Pet. No. 1047, p. 16-17; G.B. 17-20), are no less incriminating, nor more inherently reliable, nor less immune to cross-examination than the declaration in question in *O'Neil*.

say evidence. (*Compare* Pet. No. 1047, pp. 12-14 *with* G.B. at 18n. 17)

In *Dutton* v. *Evans*, 400 U.S. 64, 39 U.S.L.W. 4015 (1970) Mr. Justice Marshall, joined by Justices Black, Douglas and Brennan in dissent, stated that the prosecution's use of incriminating extra-judicial declarations of available, non-testifying declarants was "precisely what the Confrontation Clause . . . prevented." 39 U.S.L.W. at 4024. Unlike *Dutton*, however, the unconfronted evidence in this case did not carry with it the "indicia of reliability" which Mr. Justice Stewart, in the prevailing opinion in *Dutton*, found sufficient to permit the admission of evidence without confrontation. The constitutionality of the unfettered application of the co-conspirators exception in criminal cases is squarely presented in this case and should be resolved by this Court.

The remaining rationalizations by the Government for the denial of confrontation in this case are equally without merit:

(a) The denial of such a fundamental right may not be dismissed as harmless beyond a reasonable doubt in this case. Each of the *examples* cited by Petitioners constituted devastatingly incriminating evidence: many of the out-of-court declarations constituted purported price-fixing agreements which alone would have supported conviction of all defendants under the trial court's charge. *See, e.g.*, E168-178 (HCA notes) (Pet. No. 1047, pp. 10-14); J.A. 302a-303a (Bonnett-Quinn conversation) (G.B. at 17); J.A. 190a-191a. The fact that the HCA notes, for example, related only to the "fourth phase" of the conspiracy charged is irrelevant, since the jury's verdict may have been founded upon only one such "phase". As to Petitioner Decker, moreover, "sufficient" evidence existed *only* as to the "fourth phase" to which the HCA notes related. (*See supra* at 2)

(b) Pape was actually available to testify, under the standards established in *Barber* v. *Page*, 390 U.S. 719 (1968), as the trial court's denial of Pape's motion to quash the

Government's trial subpoena necessarily establishes. (See Pet. No. 1047, p. 19n.1) The Government apparently now arrogates unto itself the exclusive right to determine a witness' "availability"—a decision which they would have insulated from the bothersome requirements of the Confrontation Clause. (See G.B. at 18-19). At most, the Government's argument as to Pape's "technical availability" raises an additional issue which this Court should promptly resolve.

II. Petitioners Were Denied the Right to Confrontation and Due Process of Law by the Government's Suppression of Information Material to Their Defense.

The Government's brief ignores both the question of whether disclosure of Pape's grand jury testimony was compelled by the Confrontation Clause under the facts of this case (Pet. 1047, pp. 17-18) and the conflict between the Third Circuit's decision in this case and its own and other Circuits' decisions in other cases. (Pet. 1047, p. 19 n.1, 2)

The Government's attempt to excuse the suppression of Pape's grand jury testimony on the grounds the Petitioners waived their constitutional rights to its disclosure is legally and factually erroneous.[6] The Government's obligation to

5. The obligation to afford defendants the opportunity to confront material witnesses against them may *not* be blithely circumvented by shifting to the defendants themselves the obligation to produce purportedly incriminating witnesses as the Government implies in its brief in opposition. (G.B. at 19n.19) *See Dutton* v. *Evans*, 400 U.S. 74, —, 39 U.S.L.W. 4015, 4023n. 4 (1970) (Marshall, J., dissenting); *Lopez* v. *United States*, 373 U.S. 427, 445 (1963) (Warren, C.J., concurring).

6. Petitioners had never interviewed Pape; in fact, his counsel denied Petitioners' request to do so. *See* Transcript of Oral Argument, May 22, 1970, p. 220. Moreover, contrary to the Government's assertion, Petitioners *did not withdraw* their *request* for the production of all "Brady material": Petitioners by stipulation did withdraw their "motion", while expressly reaffirming their "request" in that stipulation (E164, ¶30(L), and renewed their "request" in court at the beginning of trial (T. 395).

make such a disclosure is not dependent upon a specific request by defendants. *See Giles* v. *Maryland*, 386 U.S. 66, 73 (1967); *Barbee* v. *Warden*, 331 F.2d 842, 845 (4th Cir. 1964); *cf., Johnson* v. *Zerbst*, 304 U.S. 458,464 (1938).

Moreover, petitioners, contrary to the Government's representation herein (G.B. at 20), repeatedly requested in open court the production of grand jury testimony, and "all material helpful or exculpatory," pursuant to *Brady* v. *Maryland*, 373 U.S. 83 (1963). Petitioners' initial request for such disclosure at a pre-trial conference was rebuffed by a representation by the prosecutor that there was no "*Brady* material," which disclaimer he then promptly retracted:

> "When you asked me is there anything in the files of the United States that shows the innocence of the defendants I would like to withdraw that answer and stand mute." (Transcript, Hearing on 10 4 68 (hereinafter "H.T.", p. 51)

The trial court denied Petitioners' immediate motion that the prosecution be ordered to make such a disclosure. (H.T. 51) Counsel for the Petitioner then interjected:

> "If it please the Court, I would like to state for the record that under Brady versus Maryland the representative of the United States cannot stand mute. If he has anything on Grand Jury, he is bound to disclose it." (H.T. 52)

The District Court merely commented:

> "Mr. Teitelbaum [counsel for American Standard] what do you want me to do, use a whip on him? He is a lawyer, he is a reputable representative of the Department of Justice. Now, under the circumstances if he stands mute what do you want me to do"?

Mr. Teitelbaum responded:

> "Under the circumstances, I think that the Court ought to force him to disclose it." (H.T. 52)

Grand jury testimony constitutes one of the Government's principal storehouses of exclusive facts and this Court should take this opportunity to clarify:

(a) whether the Government constitutionally may refuse to call an available witness, yet introduce his incriminating out-of-court declarations without disclosing to the defense that the witness contradicted, or failed to adopt, those declarations before the grand jury;

(b) whether the Government is obligated to disclose only grand jury testimony which "on the whole" is exculpatory or is compelled to disclose any material element of a grand jury witness' testimony which is either "exculpatory" or forseeably would assist defendants in preparing or presenting a defense; and

(c) whether, as in this case, the prosecutor may assert the right to stand "mute" in the face of defendants' request in open court for the disclosure of "all material helpful or exculpatory."

III. Petitioners Were Deprived of the Presumption of Innocence by the Trial Court's Charge Questioning the Probative Value of Their Exculpatory Testimony.

The Government concedes the conflict between the Third Circuit's decision in this case and the Second Circuit's decision in *United States* v. *Chas. Pfizer & Co.*, 426 F.2d 32, 39-40 (1970), *opinion modified and rehr. denied*, [1971] Trade Cas. ¶73,405 (1970). In fact, in its own petition for a writ of certiorari in *Pfizer* the Government raises the Second Circuit's contrary ruling as one of the "Reasons for Granting the Writ." (*See* Pet. No. 1286, pp. 24-27) Contrary to the Government's contention in this case Petitioners have not "failed to preserve the issue" due to their failure to object to the charge at trial. (G. B. at 24) No more concrete example of "plain error" affecting substantial rights

within the meaning of F. R. Crim. P. 52(b) could be cited than a charge such as the one in question herein which destroyed the presumption of innocence and impaired Petitioners' constitutional right to proof "beyond a reasonable doubt." (See Pet. No. 1047, pp. 20-22)

The petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

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Respectfully submitted,

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